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No. 05-1419

Supreme Court, U.S.
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In The
Supreme Court of the United States

STEVEN T. WAUGH,

Petitioner,

v.

THOMAS A. HORTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DONALD L. O'KEEFE #3976
BARBARA MICHEELS #45909
Counsel of Record
RABBITT, PITZER & SNODGRASS, P.C.
100 South Fourth Street, Suite 400
St. Louis, Missouri 63102-1821
Phone: (314) 421-5545
Fax: (314) 421-3144

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QUESTION PRESENTED

Under the "forum defendant rule," a civil action commenced in state court that meets the requirements of federal diversity jurisdiction may be removed to federal district court if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). The question presented is:

Whether the Eighth Circuit was correct to hold, in conflict with other circuits, that a violation of the "forum defendant rule" of 28 U.S.C. § 1441(b) is a jurisdictional defect requiring remand, rather than a defect "other than lack of subject matter jurisdiction" that is waived if not raised in a timely motion to remand the case?

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COUNTER-STATEMENT OF THE CASE

Federal courts are not only vested by statute with original jurisdiction to hear cases and controversies, but also are vested with removal jurisdiction to hear cases and controversies originating in state courts. 28 U.S.C. §§ 1331, 1332, 1441 (2006). Cases may be removed from state court into a federal court if they present a federal question or if the parties are completely diverse in citizenship and the controversy exceeds $75,000. 28 U.S.C. §§ 1331, 1332. Complete diversity requires that no plaintiff have the same citizenship of any defendant. *See* 28 U.S.C. § 1332(a)(1). Removal jurisdiction, however, does not allow a case to be removed if any of the defendants in the action are a citizen of the state where the plaintiff filed suit, referred to as the forum defendant rule. 28 U.S.C. § 1441(b); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 378 (7th Cir. 2000). The issue of the forum defendant rule is generally addressed in a remand order pursuant to 28 U.S.C. § 1447(c), which states, "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under § 1446(a)." Section 1447(c) also provides that "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

Section 1447(d) states, "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with the only exception for § 1443 civil rights cases. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996). The only other exception is when the decision to remand is based on grounds other than subject matter jurisdiction or defects in the removal procedure. *Id.* (finding that an abstention-based remand

order is appealable because "only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)"); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343-45 (1976) (finding district court remand due to crowded docket is not ground authorized by § 1447(c), therefore remand order is appealable).

The district court in the instant case did not specifically cite to 28 U.S.C. § 1447(c) in its remand order, but noted that "in cases (such as the present one) where diversity of citizenship is the only basis for removal, removal is precluded if any defendant is a citizen of the state in which the action is filed," citing 28 U.S.C. § 1441(b). Petitioner's App. 9a. It is not necessary for the district court to explicitly cite to 28 U.S.C. § 1447(d). *Filla v. Norfolk So. Ry. Co.*, 336 F.3d 806, 809 (8th Cir. 2003). Although the court of appeals must determine by independent review the actual grounds for the district court's remand order, *Vincent v. Dakota, Minn. & Eastern Ry. Corp.*, 200 F.3d 580, 581 (8th Cir. 1966), it need not do so in a case where it is undisputed that the district court remanded because it believed it lacked subject matter jurisdiction. *Whittley v. Burlington N. & Sante Fe R.R. Co.*, 395 F.3d 829, 830 (8th Cir. 2005).

Section 1441(b) allows for removal "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Despite the "joined and served" language of § 1441(b), the Eighth Circuit held that "the mere failure to serve a defendant who would defeat diversity jurisdiction does not permit a court to ignore that defendant in determining the propriety of removal." *Pecherski v. GMC*, 636 F.2d 1156, 1160 (8th Cir. 1981). The Eighth Circuit "explicitly rejected the argument that § 1441(b), by implication,

expanded removal jurisdiction to permit removal, despite want of diversity, if a resident defendant whose presence would defeat diversity had not been served," and held that "a court, in determining the propriety of removal based on diversity of citizenship, must consider all named defendants, regardless of service." *Id.* at 1160-61.

1. The "Forum Defendant Rule."

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b). Section 1441 allows for removal only if none of the defendants is a citizen of the state in which the action is brought. This Court recently declined to review the various circuit holdings in addressing the issue of a forum state defendant as pertains to removal jurisdiction. *See Lincoln Prop. Co. v. Roche*, ___ U.S. ___, 126 S. Ct. 606, 613 n.6 (2005).

2. Remand To State Court and Appellate Review.

Section 1447(c) mandates a remand of the case to the state court of original filing, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction. . . ." 28 U.S.C. § 1447(c) (emphasis added). When a district court order is based on a lack of subject matter jurisdiction, "the order – whether erroneous

or not and whether review is sought by appeal or be extraordinary writ – must stand." *Quackenbush*, 517 U.S. at 711-12. As directed under § 1441(b) and § 1447(c), the district court in the instant case raised the validity of removal with forum state defendants.

3. Factual Background.

Respondent Thomas A. Horton is a successor trustee for a trust created in Grundy County, Missouri. Because numerous and substantial amendments to the trust raised legal issues, Mr. Horton filed a Petition to Construe Trust Or In The Alternative For Judicial Determination Of Trust in the Circuit Court of Grundy County, Missouri on September 27, 2004. Respondent named as defendants the twelve beneficiaries affected by the trust and the subsequent changes.[1]

4. The District Court's Order.

On November 3, 2004, Petitioner, one of the twelve defendants, filed a Notice of Removal in the United States District Court for the Western District of Missouri, "pursuant to 28 U.S.C. §§ 1332(a) and 1332(d)." No other defendants joined in Petitioner's removal. Petitioner acknowledged in his Notice of Removal that three of the defendants were residents of Missouri, namely, St. Philips

[1] This case is about the removal of a petition to construe a trust, not about Petitioner's relationship with the trustors or the other beneficiaries, nor is it a platform to present Petitioner's allegations of wrongful death, as Petitioner inappropriately suggests in his Factual Background statement.

Episcopal Church and Lee and Sylvia Graber, and, as such, were forum state defendants.

The district court issued a preliminary order on November 17, 2004, addressing one issue only, the possible lack of jurisdiction pursuant to 28 U.S.C. § 1441(b). *Order,* Case No. 04-1002-CV-SJ-FJG (W.D. Mo. Nov. 17, 2004), Respondent's App. at 1b. The court referred to the three Missouri defendants and noted that if the defendants had been served, federal jurisdiction would be precluded. *Id.* at 1b-2b. The court then directed Respondent to file "a short brief addressing whether any Missouri citizen defendants had been served in the underlying state cause of action, attaching copies of returns of service of summons as needed." *Id.* at 2b.

On or about November 22, 2004, Respondent filed a short brief stating that all defendants named in the original suit had been served, affirming the fact that three of the defendants were Missouri residents and providing certified copies from the Clerk of the Court, Grundy County, of the signed returned receipts of service.[2] Although Respondent did not file a motion to remand, he provided the factual evidence to defeat removal.

On December 2, 2004, Petitioner filed a brief acknowledging the court's concerns as to complete diversity under § 1441(b) and the fact that no other defendant had joined

[2] Petitioner raises the issue of Missouri service of process for in-state parties. However, this argument was never raised in the state court or the district court. It first appeared on appeal in Petitioner's Reply Brief. Therefore, this issue may not be considered. *See Porterco, Inc. v. Igloo Prods., Corp.*, 955 F.2d 1164, 1173 (8th Cir. 1992) (citing to Fed. R. Civ. P. 46); *see also Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

in Petitioner's Notice of Removal. *Defendant's Brief,* Case No. 04-1002-CV-SJ-FJG (W.D. Mo. Dec. 2, 2004), Respondent's App. at 3b. Petitioner argued that all other defendants, except for himself, were dispensable parties who had defaulted, and were therefore no longer parties to the lawsuit when Petitioner removed the case to federal court. *Id.* at 3b-4b. Petitioner asserted that "nominal or formal parties, being neither necessary nor indispensable, are not required to join in the notice of removal." *Id.* at 3b. Petitioner did not cite to any mandatory authority to support this conclusion, but referenced a Fifth Circuit case from 1970, a Michigan federal district court case from 1958, and a Connecticut federal district court case from 1961. *Id.* at 3b-4b. Based on these same allegations, Petitioner also filed a Motion To Dismiss requesting dismissal of all defendants alleged to have not filed responsive pleadings to Respondent's petition by November 2, 2004, which meant dismissing all defendants except for Petitioner. *Id.* at 5b. Petitioner cited no statutory or case authority to support this motion.

On December 3, 2004, Petitioner filed a supplemental brief containing a single argument that his Notice of Removal was timely, due to the fact that, "The law in the Sixth Circuit is that a defendant has thirty days to cause an effective removal starting on the day that defendant was served, even if other defendants were served first," and citing to two Eighth Circuit cases, *Brown v. Tokio Marine & Fire Insurance Co., Ltd.*, 284 F.3d 871 (8th Cir. 2002) (determining application of one-year limitation period set out in 28 U.S.C. § 1446(b) where complete diversity existed at time of filing original complaint) and *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.*, 254 F.3d 753 (8th Cir. 2001) (holding that later-served

defendants have thirty days to file a notice of removal with the unanimous consent of their co-defendants, even though first-served co-defendants did not file notice of removal within thirty days of having been served).

On December 10, 2004, Judge Gaitan issued an order remanding the case back to the Circuit Court of Grundy County for lack of diversity jurisdiction under 28 U.S.C. § 1441(b) because the three Missouri defendants had been served. The court also noted that Defendant had no power to dismiss the other defendants and only the plaintiff may request dismissal of parties who fail to respond. Petitioner's App. at 11a.

5. The Eighth Circuit's Decision.

The Eighth Circuit held that it lacked jurisdiction to hear Petitioner's appeal of the district court's remand order pursuant to 28 U.S.C. § 1447(d). *Horton v. Conklin*, 431 F.3d 602, 604 (8th Cir. 2005), *reh'g & reh'g en banc denied Horton v. Waugh*, No. 05-1199 (8th Cir. Feb. 9, 2006), Petitioner's App. at 5a. The court noted that Petitioner's notice of removal was defective pursuant to 28 U.S.C. § 1446, and this fact was dispositive. *Id.*, Petitioner's App. at 3a. However, the court considered the merits of Petitioner's argument because Respondent had not filed a motion to remand. *Id.*

The Eighth Circuit held that Petitioner's argument – the presence of a defendant in the forum state was a "defect" rather than a lack of subject matter jurisdiction – was contrary the Eighth Circuit law under *Hurt v. Dow Chemical Company*, 963 F.2d 1142, 1146 (8th Cir. 1992), which holds that a violation of the forum defendant rule is a jurisdictional defect and "not a mere procedural irregularity

capable of being waived." *Horton*, 431 F.3d at 605, Petitioner's App. at 4a. The court also noted that Respondent had not waived his right to have the case remanded because he responded to a direct query from the district court about removal jurisdiction, and provided evidence of service of the Missouri defendants prior to the thirty-day window in order to defeat Petitioner's removal. *Id.* at 605 n.3, Petitioner's App. at 5a n.3.[3]

REASONS FOR DENYING THE WRIT

I. The Holding Of The Eighth Circuit Complies With The Jurisdictional Statutes.

This Court addressed the issue of "whether § 1447(d) also bars review where a case has been properly removed and the remand order is issued on grounds not authorized by § 1447(c)." *Thermtron*, 423 U.S. at 343. This Court found that the district court's removal order was not based on grounds authorized by § 1447(c). *Id.* (emphasis added). This Court limited the scope of nonreviewability under § 1447(d) to only those remand orders that are issued under § 1447(c) and that invoke the grounds specified in § 1447(c). *Id.* at 345-46. That is precisely the case before

[3] The order denying rehearing and rehearing en banc was issued on February 9, 2006. Respondent has never received any service or filings concerning Petitioner's Petition for Writ of Certiorari from Petitioner. On May 10, 2006, Respondents were first made aware that Petitioner had filed a Notice of Petition for Writ through a solicitation from a printing company stating that Mr. Waugh had filed a Petition for Writ of Certiorari and Respondent's Brief in Opposition was due on June 8, 2006. Respondent contacted the clerk of the U.S. Supreme Court to confirm Petitioner's filings and on May 12, 2006, Respondent received a copy of Petitioner's Petition for Writ forwarded by the clerk of this Court.

the court now. The district court's order was issued under § 1447(c) based on lack of subject matter jurisdiction.

The facts of the instant case do not present an exception under *Thermtron*. First, the defendant in *Thermtron* properly removed the case to federal court. 423 U.S. at 338. Petitioner did not. For proper removal, all served defendants must join in the petition for removal. *Marano*, 254 F.3d at 755. Respondent presented evidence that all defendants had been served, including the resident Missouri defendants. Petitioner removed the case without the consent of any other defendant, including three forum state defendants.

Second, there was complete diversity in *Thermtron*. 423 U.S. at 337. There is not complete diversity of citizenship among the defendants in the instant case, even though Petitioner based his removal solely on the grounds of diversity and amount in controversy. The district court's remand order was issued on grounds authorized by § 1447(c), that of "lack of subject matter jurisdiction." The district court lacked subject matter jurisdiction because Defendant removed to federal court when there was not complete diversity as required by § 1441(b).

In addition, the instant case could not have originally been filed in federal court because there was not complete diversity. Although the Eighth Circuit identified Respondent as a citizen of Maine, his state of residence, diversity jurisdiction pursuant to § 1332(c)(2) directs that "the legal representative of [a decedent's estate] . . . shall be deemed to be a citizen only of the same State as the decedent . . . ." *Lincoln Prop.*, ___ U.S. ___, 126 S. Ct. at 616. The decedent trustors were residents of Missouri. Therefore, the trustee must be considered to be a citizen of Missouri, and

complete diversity did not exist for federal jurisdiction. There was not complete diversity, and the Eighth Circuit did not "incorrectly" remand the case.

While the Eighth Circuit recognizes there are sister circuits that interpret the forum defendant rule as a procedural defect in certain circumstances, when one looks more closely at the analysis in many of the "procedural defect" case holdings, these holdings reflecting a circuit split are not substantively inapposite.

A. The Circuits That Hold The Forum Defendant Rule Is Not Jurisdictional All Have Distinguishing Facts Which Favor The Application Of A Procedural Defect.

1. Jurisdictional Circuits.

The Eighth Circuit construes the forum defendant rule as a jurisdictional requirement based on subject matter jurisdiction. *Pecherski*, 636 F.2d at 1160. The Eighth Circuit first addressed the issue of the forum defendant rule in *Pecherski*. On plaintiff's motion to set aside the judgment and remand the case to state court, the district court held that, although the defendant had not established the nondiversity of a Jane Doe defendant, defendant was not required to do so because that defendant had not yet been served. *Id.* at 1158-60. The Eighth Circuit held that the forum defendant rule limits jurisdiction based on diversity of citizenship in removed cases, and that the removal statute cannot be liberally construed. *Id.* at 1160-61. The Eighth Circuit reversed and remanded the case to state court. *Id.* at 1161.

The Eighth Circuit reinforced its strict construction of the forum defendant rule in *Hurt*, holding that a violation

of the forum defendant rule is a jurisdictional defect and "not a mere procedural irregularity capable of being waived." *Hurt*, 963 F.2d at 1146; *see also Motion Control Corp. v. SICK, Inc.*, 354 F.3d 702, 705 (8th Cir. 2003) (upholding *Hurt* precedent of forum defendant jurisdiction). In the instant case, the district court and the Eighth Circuit relied on established statutory and case law in respectively remanding the case and denying review.

Although Petitioner identifies the Sixth Circuit as a firm proponent of the procedural defect interpretation, the Sixth Circuit is by no means decided. The Sixth Circuit reviewed a case where the defendant removed the action to the district court and the plaintiff never made a request for remand but continued to prosecute up to and including trial and judgment. *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435, 436 (6th Cir. 1924). The Sixth Circuit held plaintiff's failure to timely challenge removal indicated consent, given the fact that plaintiff could have originally brought suit in federal court. *Id.* Once again, the case is easily distinguished where the plaintiff never contested jurisdiction until after a judgment had been rendered. *Id.* In fact, the court noted, "[I]f the record in [federal] court does not show jurisdiction it is the court's duty, of its own motion, to refuse to exercise it." *Id.* This is exactly what the district court did in the instant case. In a more recent, although unpublished case, the Sixth Circuit reaffirmed that it was obligated to raise jurisdictional issues *sua sponte*, and held that the forum defendant rule precluded removal of the action in *Dellinger v. Atlas Technologies, Inc.*, No. 92-2091, 1993 U.S. App. LEXIS 28313, at *3-4 (6th Cir. Oct. 28, 1993).

The Ninth Circuit interprets the forum defendant rule with a duality of purpose. In *Local Union 598 v. J.A. Jones*

Construction Co., 846 F.2d 1213, 1215 (9th Cir. 1988), the court held that "[r]emoval is a question of federal subject matter jurisdiction reviewable *de novo*." However, the court also held that "if a state action includes non-diverse parties, it may not be removed until those parties have been dismissed." *Id.* The Ninth Circuit held that the forum defendant rule is jurisdictional, but is waivable when the case has already proceeded to dismissal on a dispositive motion or a judgment has been entered in the district court. *Id.*

2. Procedural Circuits.

Perhaps considered the seminal case in establishing the forum defendant rule as a procedural defect is the Seventh Circuit's holding in *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377, 379 (7th Cir. 2000). The Seventh Circuit noted that the issue involved was one of procedural removal rather than one of true jurisdictional matter. In *Hurley*, the plaintiff filed a personal injury action in Illinois state court against four defendants, one of which removed the case to district court, even though one of the defendants was a resident of Illinois. *Id.* at 378. After removal, plaintiff dismissed the forum state defendant. *Id.* Plaintiff and the remaining defendant agreed to submit the case to a magistrate judge. *Id.* The Seventh Circuit noted that the facts of *Hurley* were particular and distinguished the case. *Id.* at 380. The court stated the problem in *Hurley* was not critical, in that "the case as it arrived in federal court met every requirement for federal jurisdiction: it simply took the wrong path, in a sense, because there was an in-state defendant. This, we think, is more a matter of removal procedure . . . [rather] than a matter of jurisdiction." *Id.* at 380.

The Seventh Circuit was also scrupulous in noting the particular problems with many of the forum defendant cases, stating the actual issue in *Hurley* was one of procedural removal rather than one of true jurisdictional matter. 222 F.3d at 379. The Seventh Circuit stated that "the theme of several recent Supreme Court decisions that have considered curable defects in diversity jurisdiction has been to find that as long as the court's jurisdiction is proper at the time of trial and judgment, the case need not be dismissed because of an earlier jurisdictional problem." *Id.* In coming to this conclusion, the Seventh Circuit relied on *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996).

In *Caterpillar*, all claims concerning the nondiverse defendant were settled and dismissed before trial commenced. 519 U.S. at 73. This Court concluded that even though the case had not been properly removed, "the District Court did have jurisdiction of the parties at the time it entered judgment. Under such circumstances the validity of the removal procedure followed may not be raised for the first time on appeal." *Id.* (citing *Grubbs v. GE Credit Corp.*, 405 U.S. 699, 700 (1972)). This Court stated its overriding concern, "Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Id.* at 76. The instant case has no parallels to *Caterpillar*, where the removal procedure was not questioned until after trial. Respondent's suit was filed in state court on September 27, 2004, defendants were served between September 28 and October 4, 2004, and the case removed on November 3, 2004. The district court raised the issue of jurisdiction shortly after removal in a November 17, 2004 order.

The First Circuit addressed the issue in *Farm Construction Services, Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987), noting that although removal was defective because the defendants were citizens of the forum state, plaintiff continued to prosecute the case in district court without objection until after judgment had been rendered. The First Circuit held that plaintiff's failure to object constituted implicit consent and waiver of its right to object to removal. *Id.* In the instant case, the district court immediately questioned jurisdiction and Respondent provided evidence verifying forum state defendants prohibiting removal.

The Second Circuit briefly addressed the fact that an action should have been remanded under § 1441(b), the forum defendant rule, but the plaintiffs failed to raise the issue until the appeal. *Woodward v. Overmyer Co.*, 428 F.2d 880, 882 (2d Cir. 1970). The Second Circuit based its holding on whether the district court would have had original diversity jurisdiction had the case been filed in the federal court, and finding it would have been based on complete diversity. In addition, the court noted the uniqueness of this particular case, which involved a mortgage foreclosure action. *Id.* at 883. This case is clearly distinguished from *Hurt* or the instant case.

In *Korea Exchange Bank v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1993), the Third Circuit held that "in considering whether jurisdictional defects existed, the relevant inquiry is whether the case could have been filed originally in federal court." The court concluded that "an irregularity in removal of a case to federal court is to be considered 'jurisdictional' only if the case could not initially have been filed in federal court." *Id.* Under this holding, the district court in the instant case correctly

remanded because there was neither a federal question nor was there complete diversity.[4] The Eighth Circuit arrived at the same conclusion dictated by the holding in *Korea Exchange Bank*. The Third Circuit discussed the fact that "section 1441(b)'s bar against removal by a forum-state citizen is not jurisdictional." *Korea Exch. Bank*, 66 F.3d at 50. However, a forum state defendant did not remove the instant case from state court.

The Third Circuit repeated the test that "an irregularity in removal of a case to federal court is to be considered 'jurisdictional' only if the case could not initially have been filed in federal court," in *In re FMC Corporation Packaging Systems Division*, 208 F.3d 445, 450 n.6 (5th Cir. 2000). The court concluded that § 1447(c) "does not authorize a District Court's *sua sponte* remand of an action based on a defect in the notice of removal, even where the notice of removal is timely." *Id.* at 451. However, the instant case was remanded for lack of jurisdiction, that is, diversity, not a defect in the removal procedure.

The Fifth Circuit held that § 1447(d) does not bar review of remands not based on § 1447(c), leaving "remand orders for lack of subject matter jurisdiction as the only clearly unreviewable remand orders." *In re Shell Oil Co.*, 932 F.2d 1518, 1520-21 (5th Cir. 1991). The court held the

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[4] In determining whether a defect is procedural, many of the other circuits rely on the inquiry of whether the case could have been originally filed in federal court, as discussed *infra*. In the instant case, because there is no federal question, complete diversity must have existed at the time of the original filing. However, as previously noted, Respondent, as trustee, is a citizen of Missouri. Therefore, whether under the application of *Hurt* or of "procedural defect," the case could not have originally been filed in federal court pursuant to 28 U.S.C. § 1332(a), making this inquiry jurisdictional, not procedural.

remand order in the case was reviewable because remand was based on an out-of-time motion. *Id.* In *In re Shell*, the district court never questioned jurisdiction under § 1447(c), unlike the district court judge in the instant case, who immediately questioned the validity of subject matter jurisdiction upon removal.

More recently, the Fifth Circuit held that a removal action "violated § 1441(b), which provides that a diversity action 'shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.'" *Bregman v. Alderman*, 955 F.2d 660, 663 (5th Cir. 1992). The court in *Bregman* noted that the holding in *In re Shell* specifically "limit[ed] our holding to cases in which the remand motions were not timely, and in which the remand orders were not based on lack of subject matter jurisdiction." *Id.* (citing *In re Shell*, 932 F.2d at 1526 n.4). When a remand order is based on grounds pursuant to § 1447(c), the Fifth Circuit held that appellate review was unavailable under § 1447(d). *Coppee v. Venezolana de Cementos, S.A.C.A.*, 31 F.3d 70, 72 (5th Cir. 1994). These Fifth Circuit holdings reflect the varying interpretations within the circuits, like the varying interpretations between the circuits, where there is some confusion over removal diversity jurisdiction, original diversity jurisdiction, and subject matter jurisdiction, as each holding demonstrates by the courts' emphasis on the facts of the individual case.

In the Eleventh Circuit case of *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1251 (11th Cir. 1999), remand was requested pursuant to a forum selection clause contained in several prior agreements made by the parties. The Eleventh Circuit specifically stated that "subject matter

jurisdiction is not at issue here," because the issue was enforcement of a forum selection clause. *Id.* at 1253. The facts of *Hurt* and the instant case do not fall within the fact pattern of *Snapper*.

The Eighth Circuit has also applied "procedural defect" involving forum state defendants. In *Nolan v. Prime Tanning, Inc.*, 871 F.2d 76, 77 (8th Cir. 1989), six of seven served defendants joined in the notice of removal except for one British corporation, "who was not participating in the suit in any way." The Eighth Circuit held, "Procedural removal requirements, such as those involved here, are not jurisdictional, and thus a party may waive the right to object to removal on these grounds," citing to *Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985), *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983), and *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).

In reviewing the district court's denial of remand in *Nolan*, the Eighth Circuit noted that the plaintiffs had consented to the dismissal of a diversity-destroying defendant, had never questioned the district court's jurisdiction after removal, had actively engaged in litigation in the district court, and only sought remand after several unfavorable rulings. 871 F.2d at 78-79. The Eighth Circuit looked to the First and Fifth Circuits to make a determination as to whether there was a jurisdictional question or a procedural defect.

> In *Farm Construction Services, Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987), the plaintiffs litigated in federal court for almost a year, seeking to remand only after judgment had been rendered. *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40, 42 (5th Cir. 1989) involved a plaintiff who,

> once brought into federal court, engaged in discovery, amended his complaint to join new parties, and waited until motions for summary judgment were filed before requesting remand. In both cases the courts upheld district court findings of waiver. We believe that this case presents similar circumstances, and we hold that the district court acted properly in refusing to remand this case to state court.

Nolan, 871 F.2d at 79. The Eighth Circuit is not that separated from the sister circuits in addressing a procedural defect.

B. The Eighth Circuit Holding in *Hurt* Complies With The Jurisdictional Statutes And Is Not Contrary To Other Circuits' Jurisdictional Or Procedural Defect Analysis.

While the holding in *Hurt* may be viewed as a stricter construction of removal jurisdiction than the other sister circuit cases discussed herein, it is also true that neither *Hurt* nor the instant case are based on a marked absence of challenge to removal, as are many of the circuit cases. Many of those cases involved suits that had gone to trial and judgment without challenge. In the instant case, the district court immediately challenged subject matter jurisdiction pursuant to § 1447(c), because it was apparent on the face of the pleadings that the case was not removable under § 1441(b) due to three in-state defendants.

Yet Petitioner removed the case, willfully and wantonly discounting the in-state defendants and ignoring the necessary consent from the other defendants. The court in *Hurt* emphasized the importance of plaintiff's right to choose a forum, and that removal jurisdiction should not

be "an alternative means for a defendant to reach that end." 963 F.2d at 1144. The Eighth Circuit read the jurisdictional statutes narrowly and held that "if one of the statutory requirements is not met, the district court has no jurisdiction." *Id.* at 1145. Like the facts in *Hurt*, where the plaintiff did not have a federal claim, neither did the plaintiff in the instant case. This was a probate matter, with all parties indispensable, "real parties in interest." *See* Mo. Rev. Stat. § 456.2-204 (stating venue for judicial proceedings involving affairs of a trust is probate division of state circuit court where trust is registered or could be registered); *Thompson v. Butler*, 136 F.2d 644, 649 (8th Cir. 1943) (holding that probate matters are generally "creatures of state law"); *Young v. Garrett*, 149 F.2d 223, 229 (8th Cir. 1945) (holding administrators of an estate and all heirs or persons interested as distributees of an estate are indispensable parties).

The court in *Hurt* noted that the facts showed there were no grounds for original jurisdiction and believed the defendant used federal preemption to force removal for its own purposes, thereby usurping the plaintiff's right to select the forum of its own choice. 963 F.2d at 1144; *see also Handley-Mack Co.*, 2 F.2d at 436-37 (discussing the fact that choice of original forum is plaintiff's). The court in *Hurt* discussed this distinction where a case was removed without challenge and tried on the merits in *Grubbs v. General Electric Credit Corporation*, 405 U.S. 699 (1972). Although the Eighth Circuit recognized that the plaintiff in *Hurt* could have filed her claim in federal court based on diversity, but chose not to, *see* 963 F.2d at 1145, Respondent had no reason or intent to file a probate matter in federal court and could not have originally filed in federal court due to lack of complete diversity.

II. Jurisdictional Rules, Like The Forum Defendant Rule, Have Historically Been Strictly Construed.

The many cases on jurisdiction indicate a basic confusion of how removal jurisdiction, original jurisdiction, and subject matter jurisdiction relate to one another. Removal jurisdiction and original jurisdiction might be considered subsets of subject matter jurisdiction, each limited by different restrictions. However, all of the limitations remain jurisdictional and should be non-waivable, as indicated in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961):

> Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth.

The fundamental rules of statutory construction are also persuasive for a narrow construction of the jurisdictional statutes. Section 1441, which contains the forum defendant rule, details the scope of "subject matter jurisdiction" in removal cases. Sections 1446 and 1447 are identified as "procedural" requirements. Section 1441(b) basically states that the district courts have removal jurisdiction where they would have original jurisdiction, with the exception of the forum defendant rule. The forum defendant rule expressly states that diversity actions "shall be removable only if" none of the defendants is a citizen of the forum state, (emphasis added), and should

therefore be construed strictly as a jurisdictional rule, as the Eighth Circuit does.

In addition, the fact that original diversity jurisdiction is narrowly interpreted and strictly enforced, is instructive in construing removal jurisdiction. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978); *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941). Although superceded in part by statute, the seminal case of original diversity jurisdiction is *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). This Court held that in a diversity action, each plaintiff should be of diverse citizenship from every defendant. *Id.* Again, although modified by statute, the seminal case on removal diversity jurisdiction is *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). This Court held that "the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." *Id.* at 108. The most logical interpretation of the forum defendant rule's limitation on removal diversity is that it should be strictly construed.

This Court's holding in *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004), supports a jurisdictional construction of the forum defendant rule. Although the holding in *Grupo Dataflux* does not address § 1441(b), it does discuss the issue of jurisdictional defect, and notes that the problem with finding waiver when a party has failed to object to a jurisdictional defect contradicts "the established principle" that subject matter jurisdiction may be raised at any point in the proceedings. *Id.* at 576. This supports a jurisdictional construction of the forum defendant rule, as opposed to the procedural construction applied by some of the circuit courts.

III. Whether the Eighth Circuit's Decision That The Forum Defendant Rule Is Jurisdictional Was Dispositive Or Not, The District Court Correctly Remanded The Case.

Under no circumstances, given the facts of the instant case, would the Eighth Circuit have been obliged to reverse the district court's remand order. Removal is authorized by 28 U.S.C. § 1441 and governed by § 1446. *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 833 (8th Cir. 2005). "Where there are multiple defendants, all must join in a notice to remove within thirty days of service." *Id.* In the Eighth Circuit, with the issue of removal jurisdiction, a district court must consider all forum state defendants, even though they may not yet have been served. *Pecherski*, 636 F.2d at 1160. The Eighth Circuit and the district court judge involved in the instant case were well versed in the intricacies of a defendant's responsibilities in a removal procedure, both having analyzed the question in depth in one of the Eighth Circuit's seminal cases on removal, *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.*, 254 F.3d 753, 757 (8th Cir. 2001) (accepting the rule of unanimity and holding that "later-served defendants in this case had thirty days from the date of service on them to file a notice of removal with the unanimous consent of their co-defendants, even though the first-served co-defendants did not file a notice of removal within thirty days of service on them").

Petitioner acknowledged there were eleven other defendants involved in the instant action, but asserted that all of the other defendants were "merely nominal or formal parties," and told the district court that all of the other defendants "did not respond to the Complaint in any

way." Respondent's App. at 3b. Petitioner's only argument in support of these conclusions was the single statement, "Because the other defendants all defaulted, they are properly considered to be nominal or formal defendants." *Id.* at 4b. As the district court judge noted, Petitioner failed to present any factual support or case law to support his allegations or conclusion. Petitioner's App. at 10a-11a. In addition, when preparing the appeal, these defendants contacted by Respondent stated they had never received notification of a notice of removal.

"[I]t is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' . . . 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *United States v. Hays*, 515 U.S. 737, 743 (1995) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Petitioner failed to allege facts and law "demonstrating" that he properly invoked removal jurisdiction. *See id.*

Petitioner's contention that *Hurt* supported Petitioner's removal without consent of all the defendants, is an overly broad interpretation of the statement in *Hurt*. The court in *Hurt* affirmed the holding in *Nolan*, 871 F.2d at 77, agreeing to the fact that where one defendant, "who was not participating in the suit in any way," did not join in the removal notice, the defect was procedural, not jurisdictional. 963 F.2d at 1146 n.1. Neither the holding in *Nolan* or *Hurt* supports Petitioner's argument that he did not need consent from any other defendant. In the instant case, all twelve defendants were identified as real parties in interest. The failure of eleven out of twelve of those defendants to consent to removal cannot be a "mere"

procedural defect simply because the Petitioner deems it so in order to obtain his preferred forum.

As for Petitioner's reliance on case law outside of the Eighth Circuit in reviewing the underlying district court of Missouri actions, again, the facts of the cases are distinguished from the instant case. In *Payne v. Brake*, 439 F.3d 198, 202-03 (4th Cir. 2006), a wrongful death action against approximately twenty-two state entities and employees, with extended procedural problems and two separate suits, the critical issue involved a statute of limitations problem. The court noted that the district court had jurisdiction because the plaintiff had alleged federal law violations in her petition. *Id.* at 204. In *Loftis v. UPS, Inc.*, 342 F.3d 509, 517 (6th Cir. 2003), the court held that the district court should have granted a motion to remand given the fact that one of the defendants objected to removal and had sought remand.

In addition, the Eighth Circuit did not err in stating that Respondent's brief providing evidence of service for the forum state defendants "arguably obviated the need to file a motion to remand." *Horton*, 431 F.3d at 605 n.3; Petitioner's App. at 5a n.3. Petitioner misrepresents the facts when he states, "Respondent's brief recited only the facts concerning service upon the in-state defendants; it did not request remand." The district court issued an order on November 17, 2004, fourteen days after Petitioner filed his Notice of Removal, stating its concern was lack of jurisdiction to hear the case, "In cases (such as the present one) where diversity of citizenship is the only basis for removal, removal is precluded if any defendant is a citizen of the state in which the action is filed. See 28 U.S.C. § 1441(b)." Respondent's App. at 1b. The district court's order made it clear that "if these defendants have been

served in the state court proceedings, removal would be improper and this Court would not have jurisdiction." *Id.* at 1b-2b. The court directed Respondent to submit "a short brief addressing whether any Missouri citizen defendants have been served in the underlying state cause of action . . . ." *Id.* at 2b. As directed, Respondent filed a short brief providing evidence of service for all three Missouri defendants.

The purpose of the district court's order was clear. Under the federal rules of simplified pleadings in civil actions, giving the opposing party "fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved," is sufficient. *Bowles v. Osmose Utils. Servs.*, 443 F.3d 670, 675 (8th Cir. 2006) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14 (2002)). Petitioner knew what sort of claim the district court and Respondent were making due to the district court's order questioning jurisdiction. *See id.* Filing a motion for remand was superfluous in the instant case.

The district court did not *sua sponte* remand a case based on a defect in the removal process, as Petitioner states and supports with inapposite sister circuit cases. The district court believed this was a concern of subject matter jurisdiction, which the court may raise at any time before final judgment. 28 U.S.C. § 1447(c). The fact that Respondent's Reply to Affirmative Defenses and Answer was filed in a timely manner, which at that time was while the case was in the district court, and that Respondent's "Wherefore" clause requested adjudication, is specious evidence that Respondent intended for the case to stay in the district court. Petitioner's reliance on this point is without merit.

In any event, the instant case could never have been originally filed in federal court because there was no federal question involved nor was there complete diversity, with the citizenship of the trustee, Respondent, legally being derived from the state of the decedent. *See Lincoln Prop.*, ___ U.S. ___, 126 S. Ct. at 616.

IV. The Question Presented Does Not Merit Review.

The sister circuits, within and without, have varying opinions, based on the facts of the individual cases, as to the determination of procedural defect and subject matter jurisdiction. In the 80 years since the question first arose, the circuits have refined each holding based on the facts of each case. This Court had the opportunity to review the question in *Hurt v. Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992) and *Motion Control Corp. v. SICK, Inc.*, 354 F.3d 702 (8th Cir. 2003), and declined to do so. More recently, in *Lincoln Property Company v. Roche*, ___ U.S. ___, 126 S. Ct. 606, 613 n.6 (2005), this Court declined to review the issue that "several lower courts have held that the presence of a diverse but in-state defendant in a removed action is a 'procedural' defect, not a 'jurisdictional' bar, and that the defect is waived if not timely raised by the plaintiff." Respondent respectfully maintains, given the particular facts of this case, it is not appropriate or suitable to use this case to review a question of differing interpretations of the forum defendant rule within the circuits.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny Petitioner's Petition for Writ of Certiorari and affirm the decision of the Eighth Circuit

that it lacked jurisdiction to review the district court's order remanding the case to state court.

Respectfully submitted,

DONALD L. O'KEEFE #39278
BARBARA MICHEELS # 45909
RABBITT, PITZER & SNODGRASS, P.C.
Attorneys for Respondent
Thomas A. Horton
100 South Fourth Street, Suite 400
St. Louis, Missouri 63102-1821
(314) 421-5545
(314) 421-3144 (Fax)

APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

THOMAS A. HORTON Plaintiff, vs. KATHERINE A. CONKLIN, NORMAN S. REDHEAD, STEPHEN W. TEMPLAR, STEVEN T. WAUGH, HOLY CROSS EPISCOPAL CHURCH, NATIONAL EPILEPSY FOUNDATION, ST. PHILIPS EPISCOPAL CHURCH, ALISON HORTON WALDRIP, CARING FRIENDS OF DENVER, LEE GRABER, SYLVIA GRABER, and STEVEN ASAY, Defendants.	)	Case No. 04-1002-CV-SJ-FJG

ORDER

Before the Court is defendant Steven T. Waugh's Notice of Removal (Doc. No. 1). Defendant Waugh premises his notice of removal on diversity of citizenship, pursuant to 28 U.S.C. §§ 1332(a) and 1332(d).

In its preliminary review of this matter, the Court is concerned that it may not have jurisdiction to hear this case. In cases (such as the present one) where diversity of citizenship is the only basis for removal, removal is precluded if any defendant is a citizen of the state in which the action is filed. See 28 U.S.C. §1441(b). From the face of

plaintiffs complaint it appears that three of the named defendants (St. Philips Episcopal Church, Lee Graber, and Sylvia Graber) are citizens of the state of Missouri. If these defendants have been served in the state court proceedings, removal would be improper and this Court would not have jurisdiction. See Hurt v. Dow Chem. Co., 963 F.2d 1142, 1144-1145 (8th Cir. 1992) (noting that, under Eighth Circuit law, the ban on local defendants is a jurisdictional defect that may be raised at any time, as opposed to a procedural defect that must be raised by plaintiff within 30 days of the notice of removal).

In order to more quickly determine whether this Court has jurisdiction to hear this case, the Court **DIRECTS** plaintiff to file a short brief addressing whether any Missouri citizen defendants have been served in the underlying state cause of action, attaching copies of returns of service of summons as needed. Plaintiff shall file this brief with the Court via ECF on or before **November 24, 2004**. Defendant Waugh shall file his response to this brief on or before **December 2, 2004**.

IT IS SO ORDERED

/s/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: _November 17, 2004_
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SAINT JOSEPH DIVISION

THOMAS A. HORTON Plaintiff	)	
vs.	)	CASE NO. 4:04-cv-1002
KATHERINE A. CONKLIN, et al Defendants	)	

BRIEF

Defendant Steven T. Waugh hereby files this Brief in response to the Court's order of November 17, 2004, and in response to Plaintiff Thomas A. Horton's Brief dated November 22, 2004.

Defendant Steven T. Waugh understands the court's inquiry to question whether this case was properly removable under 28 U.S.C. 1441(b) when some of the named defendants are citizens of Missouri and when not all of the defendants joined in the removal. However, the remaining defendants were not required to join in the removal because (1) they were merely nominal or formal parties and because (2) they did not respond to the Complaint in any way.

The law is clear that nominal or formal parties, being neither necessary nor indispensable, are not required to join in the petition for removal. Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen & Assistants' Local 349, etc., 427 F.2d 325, 327 (5th Cir. 1970) That court noted two formulations of the test of whether a named defendant is a

nominal party or not. The first formulation of the test is if "his role in the law suit is that of a depositary or stakeholder . . . ". Id at 327, citing Colman v. Shimer, 163 F. Supp. 347 (W. D. Mich. 1958). The second formulation of the test is whether "in the absence of the [defendant], the Court can enter a final judgment consistent with equity and good conscience which would not be in any way unfair or inequitable to plaintiff." Id at 327, citing Stonybrook Tenants Association, Inc. v. Alpert, 194 F.Supp 552, 559 (D. Conn., 1961).

In his November 22, 2004, brief, Plaintiff Thomas A. Horton indicates that Lee Graber and Sylvia Graber as well as St. Phillips Episcopal Church, all residents of Missouri, were served on September 28, 2004. According to the web site maintained by the State of Missouri, Office of the State Courts Administrator, other than defendant Steven T. Waugh, all of the named defendants that were served were served on or before October 1, 2004. Defendant Steven T. Waugh was served on October 4, 2004. Missouri state law requires an answer to be filed within 30 days of service. By November 2, 2004, when the Notice of Removal had been filed, none of the other defendants had responded to the complaint in any way. Accordingly, they had all defaulted as of November 1, 2004, and were no longer properly considered to be defendants. As a result, this Court can enter a final judgment in the absence of the other defendants that is consistent with equity and good conscience which would not be in any way unfair or inequitable to plaintiff

Because the other defendants all defaulted, they are properly considered to be nominal or formal defendants. As such, they need not have joined in the removal and

need not be considered as defendants when applying 28 U.S.C. 1441.

Contemporaneously with this brief, Defendant Steven Waugh is filing a motion requesting the court to dismiss from this action all the parties that have not filed answers.

Dated: December 2, 2004

Respectfully submitted,

/s/ Ronald F. Weiszmann
Ronald F. Weiszmann
Ronald F. Weiszmann,
L.L.M., P.C.
1120 Lincoln Street
Denver, Colorado 80203

Local Counsel:
Douglas D. Silvas
Spradley & Riesmeyer,
a professional corporation
4700 Belleview, Suite 210
Kansas City, Missouri
64112-1359
(816) 753-6006 telephone

Attorney for defendant
Steven T. Waugh